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IN THE
SUPREME COURT of the UNITED STATES
October Term, 1974

NATHANIEL W. BOYD, III, D.O.,
Petitioner

v. No. _____

COMMONWEALTH OF PENNSYLVANIA
STATE BOARD OF OSTEOPATHIC EXAMINERS,
Respondent.

Petition for Writ of Certiorari
to the Commonwealth Court of the
Commonwealth of Pennsylvania

BRIEF FOR PETITIONER

Petitioner, NATHANIEL W. BOYD, III, D.O., respectfully prays this Court to issue a Writ of Certiorari to review the final decision of the Commonwealth Court of the Commonwealth of Pennsylvania, which decision was entered on March 27, 1974. Petitioner petitioned the Supreme Court of Pennsylvania for an allowance of appeal which was denied on July 19, 1974. A petition for reconsideration was denied on November 4, 1974, the notice of which was dated November 12, 1974.

OPINION BELOW

The decision of the Commonwealth Court is set forth and the denials of the Supreme Court of Pennsylvania are set forth in the Appendix, starting at A-1.

JURISDICTION

The jurisdiction of the Court is invoked under Title 28 United States Code, Section 1254.

QUESTIONS PRESENTED

I. DOES A STATE BOARD OF OSTEOPATHIC EXAMINERS DEPRIVE PETITIONER AND HIS PATIENTS AND THE PUBLIC OF THEIR CONSTITUTIONAL RIGHTS TO FREEDOM OF EXPRESSION, TO PRIVACY AND TO PREVENT DEFENDANTS FROM DEPRIVING PETITIONER, A PHYSICIAN, OF HIS RIGHT TO EARN A LIVING AND HIS PROPERTY RIGHTS, AND DO A PETITIONER, HIS PATIENTS AND THE PUBLIC HAVE CONSTITUTIONAL RIGHTS TO PRIVACY, TO BE LET ALONE, AND DOES PETITIONER HAVE A CONSTITUTIONAL RIGHT TO TELL HIS PATIENTS AND THE PUBLIC ABOUT NON-HOSPITAL, NON-SURGICAL METHODS OF HEALTH CARE AND HEALING AND DO HIS PATIENTS HAVE A RIGHT TO KNOW THIS INFORMATION AND DOES PETITIONER HAVE A CONSTITUTIONAL RIGHT TO PRACTICE OSTEOPATHY AND TO EARN A LIVING?
Petitioner submits that the answer is "yes."

II. DOES RESPONDENT'S SUSPENSION OF PETITIONER'S LICENSE TO PRACTICE OSTEOPATHY ON THE GROUNDS THAT PETITIONER ADVERTISED A BOOKLET ON NON-SURGICAL, NON-HOSPITAL CORRECTION OF HEMORRHOIDS, HERNIA AND PROSTATE PROBLEMS, WHICH BOOKLET CONTAINED TRUTHFUL INFORMATION, DEPRIVE PETITIONER OF HIS CONSTITUTIONAL RIGHTS, BECAUSE SUCH ADVERTISING AND SUCH BOOKLETS ARE PROTECTED BY THE FREEDOM OF SPEECH AND FREEDOM OF PRESS GUARANTEES OF THE FIRST AMENDMENT EVEN IF PETITIONER CHARGES A FEE FOR THE HEALING SERVICE HE PERFORMS?
Petitioner submits that the answer is "yes."

STATEMENT OF FACTS

On November 14, 1974, the Pennsylvania State Board of Osteopathic Examiners (Board) caused petitioner's license to practice osteopathic medicine and surgery to be suspended for six months starting in December 1974. State agents took

petitioner's license from his office on December 16, 1974.[1] Petitioner has been practicing osteopathy in York County for over 25 years. Never has a patient complained or filed a lawsuit for malpractice. The Board has not questioned petitioner's skill as an osteopathic physician and surgeon. The grounds for suspension are advertisements, defendants alleged are "unethical."

Since 1951, petitioner has purchased ad space in Pennsylvania and Maryland newspapers and has offered a booklet on the non-hospital or non-surgical treatment of hemorrhoids, hernia and prostate problems. The booklet factually explained to the public that a non-hospital alternative treatment for these problems was available. The booklets were in good taste, did not solicit patients and did not make any false or misleading representations. The newspaper advertising did not solicit patients and merely offered the booklet.

Petitioner has approximately 60 patients under treatment. Doctors who treat these problems without hospitalization are few and far between. The future patients will suffer if the suspension continues. Petitioner emphasizes his skill as a healer has never been challenged by the State or by the defendants. Petitioner does not treat cancer, and if hospitalization is necessary, or if the patient has cancer, he refers the patient to another doctor.

Dr. Boyd is an osteopath, a distinct healing art which prides itself on its ability to offer alternatives to allopathic medicine as practiced by M.D.'s. This alternative has historically involved less drastic and dangerous modalities than

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[1]Petitioner and respondent disagree slightly on the effective date of the suspension. The date respondent physically removed petitioner's license was December 16, 1974.

surgery and certain drugs. He has been adhering to the principles of osteopathy and has been advertising his booklet to inform citizens about alternatives to hospital surgery for hemorrhoids, hernia and prostate enlargement.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are the First, Fourth, Fifth, Ninth and Fourteenth Amendments of the United States Constitution.

ARGUMENT

I. DOES A STATE BOARD OF OSTEOPATHIC EXAMINERS DEPRIVE PETITIONER AND HIS PATIENTS AND THE PUBLIC OF THEIR CONSTITUTIONAL RIGHTS TO FREEDOM OF EXPRESSION, TO PRIVACY AND TO PREVENT DEFENDANTS FROM DEPRIVING PETITIONER, A PHYSICIAN, OF HIS RIGHT TO EARN A LIVING AND HIS PROPERTY RIGHTS, AND DO A PETITIONER, HIS PATIENTS AND THE PUBLIC HAVE CONSTITUTIONAL RIGHTS TO PRIVACY, TO BE LET ALONE, AND DOES PETITIONER HAVE A CONSTITUTIONAL RIGHT TO TELL HIS PATIENTS AND THE PUBLIC ABOUT NON-HOSPITAL, NON-SURGICAL METHODS OF HEALTH CARE AND HEALING AND DO HIS PATIENTS HAVE A RIGHT TO KNOW THIS INFORMATION AND DOES PETITIONER HAVE A CONSTITUTIONAL RIGHT TO PRACTICE OSTEOPATHY AND TO EARN A LIVING? YES.

Petitioner's patients and the public have a right to be educated on the subject of non-hospital, non-surgical techniques. Kline v. Vlandis (D. Conn., 1972) 346 F. Supp. 526. Cf. Kerr v. Enoch Pratt Free Library (CA 4 1945) 149 F. 2d 212, cert. den. 326 US 721; Smith v. Hampton Training School for Nurses (CA 6 1966) 360 F. 2d 577.

Dr. Boyd's property rights are protected by the Fourteenth Amendment. Adams v. Park Ridge (CA 1961) 293 F. 2d 585; Tichon v. Harder (CA 2 1971) 433 F. 2d 1396; Cisneros v. Cavell (CA 3 1971) 438

F. 2d 1202, 1203. The right of commercial enterprise is a Fifth and Fourteenth Amendment right, according to the U.S. Supreme Court in Algeyer v. Louisiana (1897) 165 U.S. 578.

The U.S. Supreme Court in 1973, in Roe v. Wade 410 U.S. 113, and Doe v. Bolton 410 U.S. 179, "the abortion cases," extended the Bill of Rights freedoms inherent in the Fourteenth Amendment to doctors and their patients, thereby immunizing from state intervention the choice between having an abortion or having a baby. Petitioner contends that he and his patients and the public have rights to this same protection when the treatments are other than abortion. This issue is the same: the freedom of the patient to choose a method of medical treatment and the doctor to provide the treatment chosen even if the state and other physicians and professional associations disagree with the treatment. This right to privacy in health matters, the U.S. Supreme Court held in the "Abortion case," is in a private zone where intrusion by the state and state officers is not only unwelcome, but is forbidden.

Mr. Justice Blackmun in Roe v. Wade at 410 U.S. at 152:

> ...(t)he Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts the Court or Individual Justices have indeed found at least the roots of that right in the First Amendment.

Concurring at 410 U.S. 213, Mr. Justice Douglas listed as a right retained by the People under the Ninth Amendment:

> ...the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf. (Emphasis by Mr. Justice Douglas.)

These basic rights to life, health and liberty are real and guaranteed under the Ninth Amendment if not implied as rights of the People elsewhere in the Bill of Rights and the Fourteenth Amendment. The State cannot deny basic and general rights merely because the Founding Fathers could not protect us from every conceivable misuse of power of which the state is capable. Further, the right to life is a constitutionally-protected right. Brazier v. Cherry (CA 5 1961) 293 F. 2d 401, certiorari denied 368 US 921; Delatte v. Genovese ED La. 1967) 273 F. Supp. 654.

If a woman can destroy an unborn fetus because her body is private and her own private business and not that of the state, then a man or woman should be able to attend to any other body "problem" without state interference; otherwise, citizens with an unwanted physical condition, other than pregnancy, and their doctor are discriminated against if denied the freedoms that are given to abortion, and to doctors who practice that art, and their patients who want abortion. Certainly, abortion is not the only medical treatment immune from state interference as to matters of choice and truthful, factual information.

The U.S. Supreme Court recognized the right to privacy as a constitutional right in 1965. Griswold v. Connecticut 391 U.S. 479. Deprivations of equal protection of the law and discrimination are wrongs from which persons are protected by the Fourteenth Amendment.

II. DOES RESPONDENT'S SUSPENSION OF PETITIONER'S LICENSE TO PRACTICE OSTEOPATHY ON THE GROUNDS THAT PETITIONER ADVERTISED A BOOKLET ON NON-SURGICAL, NON-HOSPITAL CORRECTION OF HEMORRHOIDS, HERNIA AND PROSTATE PROBLEMS, WHICH BOOKLET CONTAINED TRUTHFUL INFORMATION, DEPRIVE PETITIONER OF HIS CONSTITUTIONAL RIGHTS, BECAUSE SUCH ADVERTISING AND SUCH BOOKLETS ARE PROTECTED BY THE FREEDOM OF SPEECH AND FREEDOM OF PRESS GUARANTEES OF

THE FIRST AMENDMENT EVEN IF PETITIONER CHARGES A FEE FOR THE HEALING SERVICE HE PERFORMS? YES.

The First Amendment rights, including freedom of religion, freedom of speech, freedom of the press, freedom of assembly and freedom of association, are protected by the Fourteenth Amendment. Minersville School District v. Globitis (U.S. Supreme Court, 1949) 310 U.S. 586; Douglas v. City of Jeannette (1943) 319 U.S. 157 rehearing denied, 319 U.S. 782; Near v. Minnesota (1931) 283 U.S. 697.

The right to distribute literature has been held to be protected by the First and Fourteenth Amendments. Tinker v. Des Moines School Dist. (1969) 393 U.S. 503, 508; Terminiello v. Chicago (1949) 337 U.S. 1, 69.

The right to buy pornographic books and pictures and political activist newspapers is followed by the right to possess even obscene movie films in the privacy of one's own home. The Supreme Court held in Stanley v. Georgia (1969) 394 U.S. 557, 564-565.

The First Amendment allows petitioner to discuss openly and freely all matters of public concern. Thornbill v. Alabama (1940) 310 U.S. 88; Martin v. City of Struthers (1943) 319 U.S. 141; Lamont v. Postmaster General (1965) 381 U.S. 301. First Amendment protection covers the kind of expression respondents claim justifies suspension of petitioner's license. The First Amendment protects a doctor, such as plaintiff, when that doctor publishes information that causes concern over excessive surgery, over-utilization of hospitals and pain and complications from surgery. The First Amendment protects this kind of advertising. The U.S. Supreme Court has rejected attempts to exclude categories of speech and expression from the protection of the First Amendment by attaching labels on the particular type of speech or expression that offended someone. NAACP v. Button (1963) 371

U.S. 415; New York Times Co. v. Sullivan (1964) 376 U.S. 254. Rather than looking at labels, the Supreme Court looks at content.

Advertising has been given First Amendment protection. The U.S. Court of Appeals for the Ninth Circuit rejected the "rather curious view that by nature all advertisements are necessarily devoid of literary, artistic or social value." U.S. v. Young (1972) 465 F. 2d 1096, 1100-01.

In Martin v. City of Struthers, supra, the U.S. Supreme Court declared unconstitutional an ordinance which prohibited the summoning of occupants of a residence to receive advertisements. In Hiett v. U.S.(1969) 415 F. 2d 664, the U.S. Court of Appeals for the Fifth Circuit held that the distribution of advertisements soliciting Mexican divorces is protected by the First Amendment and that a statute which operated to prohibit the use of the mails to distribute information on Mexican divorces was unconstitutional. The Court rejected the argument that "commercial" advertising was not protected by the First Amendment, and held that an advertisement which conveys "information on matters of social importance ... is also given extensive Constitutional protection." Hiett, supra at 672.

One such matter of "social importance" is apparently whether to have a baby or an abortion. Attempts by government officers to restrict the advertising of abortions have been deemed unconstitutional by federal courts. Associated Students for The University of California at Riverside v. Attorney General (CD Ga. 1973) 368 F. Supp. 11; Atlantic Co-op News Project v. U.S. Postal Service (ND Ga. 1972 - 3 judge court) 350 F. Supp. 234.

The solicitation of funds and profit are also protected by the First Amendment. New York Times v. Sullivan (1964) 376 U.S. 254; Smith v. People of the State of California (1959) 361 U.S. 147, 150, rehearing denied (1960) 361 U.S. 950.

The fact that plaintiff is paid a fee for the service he renders as an osteopathic physician and

surgeon should make no difference and should not deprive him of his constitutionally-guaranteed right to freedom of speech and freedom of the press.

In Smith v. People of the State of California, supra, at 361 U.S. 150, Mr. Justice Brennan held:

> It is of course no matter that the dissemination takes place under commercial auspices.

In Ginzburg v. U.S. (1966) 383 U.S. 463, Mr. Justice Brennan wrote:

> ...(C)ommercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment. (Citing New York Times, supra, and Smith, supra.)

Nevertheless, the U.S. Supreme Court's 1942 opinion, Valentine v. Chrestensen, 316 U.S. 52, has prompted the siting of this case of limitation of First Amendment freedoms for the principle that "commercial advertising" is not protected by the First Amendment. In Crestensen, an owner of a submarine sold tickets for tours on the boat and advertised by way of handbills in violation of a health ordinance of the City of New York. On the handbill advertising his tour, he placed a "moral platitude." The Supreme Court did not consider his advertising worthy of First Amendment protection. However, this means merely that one cannot litter and claim First Amendment protection whether the written content of the litter is commercial, political or religious. The commercial nature of motive or content is of no moment.

Commenting on Crestensen in his concurring opinion in Cammarano v. U.S. (U.S. Supreme Court, 1959) 358 U.S. 498 at 534, Mr. Justice Douglas said:

> The ruling was casual, almost offhand. And it has not survived reflection. That "freedom of speech or of the press" directly guaranteed

> against encroachment by the Federal Government and safeguarded against state action by the Federal Government and safeguarded against state action by the Due Process Clause of the Fourteenth Amendment is not in terms or by implication confined to discourse of a particular nature and kind ... the profit motive should make no difference. ...
> (Emphasis Added.)

The note, "Freedom of Expression in a Commercial Context" 78 Harvard Law Review 1191, 1196, makes a cogent distinction between two kinds of advertising: (1) purely informational advertising, and (2) repetitive, motivating advertising:

> A distinction may perhaps be drawn between purely informational advertising like a telephone listing, and repetitive and want-creating advertising, the former at least being protected by the First Amendment.

In the defendants' suspension of petitioner's license to practice his healing art, plaintiff was not charged with creating any want for office treatment of hemorrhoids, hernia or prostate difficulties. The illnesses had already created the want. Petitioner was only providing those who already wanted relief with information on one source of relief.

Petitioner's message to the public is delivered to potential patients at a time and under circumstances that afford potential patients ample opportunity for r ~lection and discussion.

The "time to thin" test evolved from the "clear and present danger" test in Whitney v. People of the State of California (1927) 274 U.S. 35 and the requirement in Dennis v. U.S. (1951) 341 U.S. 494 at 507 that the First Amendment does "not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce

such action." (Emphasis added.) Brandenburg v. Ohio (1969) 395 U.S. 444 at 447.

In Giboney v. Empire Storage and Ice Co. (1949) 336 U.S. 490, 498, the U.S. Supreme Court applied the "time to think" test where the advertising was not coercive.

Plaintiff's message is neither motivating nor directed to produce immediate action of any kind and the service, the injection method of correcting hemorrhoids, hernia and prostate difficulties, is not illegal. Plaintiff's message is informative and leaves ample time and opportunity to ponder and discuss alternatives. Petitioner's message is legal and ethical and suspending his license for spreading that message is a violation of the First Amendment.

Another distinction is between advertising an inherently illegal "commercial" activity and advertising an illegal activity. In the case at Bar, petitioner's services were legal and not challenged by defendants.

Advertising that has impact on attitude contains the type of expression the Founding Fathers meant to protect. Even "commercial" expression that would raise issues and cause a change in the law is protected by the First Amendment. In 1960, the U.S. Supreme Court held in Bates v. City of Little Rock 361 U.S. 516 at 524:

> Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinate interest which is compelling.

The state has no compelling subordinate interest in preventing the kind of advertising that defendants used as grounds to suspend petitioner's license. Petitioner's ability as a healer has never been questioned by respondents. Petitioner's methods have not been challeged by the respondent who presumably had the power, if not the duty, to challenge methods of healing that are harmful or fraudulent.

The constitutional rights of patients can be invoked by a physician. In Griswold v. Connecticut, supra, the U.S. Supreme Court noted that if the physician-petitioner had not been allowed to raise the constitutional rights of his patients, they probably would not be raised by anyone.

Dr. Boyd, the petitioner, is not charged with fraud or misrepresentation. Nor is he charged with causing any harm or posing any threat to patients. In suspending Dr. Boyd's license to practice, respondents charged him only with "unethical advertising." The justifiable limitation of speech and of the press in cases of fraud, misrepresentation and the promotion of dangerous and ineffective drugs or treatments must be distinguished from the limitation of speech and expression on grounds that the utterance violates some principle of professional ethics, a principle that has the effect of creating a monopoly of ideas. The realm of health should not be set aside as an area where the freedom of expression can be restricted whenever it suits the economics or politics of doctors in positions of power.

The issue of medical advertising is currently before the U.S. Supreme Court in Bigelow v. Virginia (73-1309)

CONCLUSION

Petitioner, Dr. Boyd, prays this Court to grant a Writ of Certiorari.

Respectfully submitted,

John Joseph Matonis
Counsel for Petitioner
2603 P Street, N.W.
Washington, DC
Telephone: 202/338-4200
4201

Feb. 3, 1975

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February, 1975, I served, by U.S. Mail, postage prepaid, a copy of this Petition for a Writ of Certiorari upon Lawrence Alexander, Esq. Office of the Pennsylvania Attorney General, Harrisburg, Pennsylvania.

JOHN JOSEPH MATONIS